

In conclusion let me say this: The practice of scientific medicine is being purified by adversity and has been from its inception. The law is going to be purified and revived within the next decade. Within that time many old scandals will have been done away with. For one thing, "the law's delays"; for another, expert medical testimony. Andrew D. White, former President of Cornell University and Ambassador to Germany, has made a study of the criminal conditions of various countries. There are now about eight thousand homicides a year in the United States. In Canada there are but three murders per million. Canada punishes with death seven-eighths of the men convicted of murder. In the United States one out of seventy-four is executed, and the average life sentence figures down to seven years. There was not a single lynching in the whole British Empire during 1909. In the United States there were eighty-seven. What is his explanation? He says that our criminal procedure, *especially expert testimony* and the ease of appeal, is the explanation.

It is safer to kill a man in the United States than to kill a deer in the forest. (Collier's, Vol. XLIV, No. 24, p. 17 and 18.)

Another scandal to disappear will be that connected with medical expert testimony. It will only come as a result of endeavor. It seems to me it is high time that we begin doing our part. It is up to us.

MEDICAL EXPERT TESTIMONY.*

By ANDREW STEWART LOBINGIER, A. B., M. D.,
Los Angeles.

A strong sentiment has developed in this country in recent years calling for reforms in the appointment of the medical expert witness. The abuses out of which this demand has arisen are partly attributable to the Bar and partly to the medical profession. They are more directly due to an astonishing laxity in the regulations of the Judiciary, whereby such matters might be, but are not, properly controlled.

For more than a generation the testimony of the medical expert has been a purchasable commodity. From a factor whose learning and experience should prove a distinct assistance to the court in determining the adjudication of technical difficulties, the medical expert has, by virtue of the false position he has been brought to occupy, become an object of ridicule and contempt. Why is this true? There are several very obvious reasons:

1. By the present method of choosing the expert witness he is at once the victim of bias and becomes an advocate for the side that employs and pays him.
2. Experts are not selected chiefly on account of

any fitness or training in the subject on which testimony is to be offered, but as to whether they shall prove to be strong partisans and clever defenders of the side which employs them.

3. Such a system of selecting the expert, and the discourteous methods of counsel in cross-examination, creates a genuine disgust and aversion among modest and scholarly professional men for appearance on the witness stand. The result is that the best talent is not obtainable and the choice must lie amongst inferior minds, if not, as frequently is seen, amongst actual pretenders and charlatans.

It is also manifest that the number of so-called experts, who receive their compensation at their own appraisal from the side employing them, is limited only by the capacity of the purse of the employer. This fact and the diametrically opposite testimony of professional men of equal standing, not uncommonly converts a trial into a travesty, from which neither court, counsel nor jury can extricate it.

Other evils complicate and prolong the action and prove subversive of the ends of justice. One of these is the lengthy and involved "hypothetical question," the answer to which has been prearranged before the question is asked. Another is the custom of opposing counsel to anger, disconcert and unhorse the witness by every artifice or coarse and offensive aggression which may be employed.

No physician or surgeon who values his self-respect or cherishes the dignity which years of learning, experience and culture have brought to him, will voluntarily subject himself to such an ordeal of abuse for any compensation which can be named.

The expert witness should not only be a scholar in the special learning he is called to reveal to the court, but he should be sedulously shielded and graciously encouraged, so that his testimony may be couched in clear language and be most informing. Is not that the object for which he is called? Are not the courts the forums of justice? If so, then we must see to it that conditions are permitted to prevail which shall keep inviolate the plain and obvious facts of science and not enshroud their simple relating in the befogging and boisterous controversies of partisans.

The conditions which should surround the medical expert must be established by the court and bar, and by them be consistently maintained. If the legislature has not properly provided for this espionage so that the ends of justice may be at all times insured, then it is clearly the province of such distinguished bodies as yours to effect the needed reform.

No matter what the legislation or the attitude of the law may be, it must be remembered that the laws of medical science are not affected. Only men

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of scholarship and repose are qualified to properly interpret them.

If the vice of prejudice is permitted to dominate the selection of the medical expert, then a prejudiced and superficial opinion need not surprise us. Nothing can rescue the expert from this obliquity, whose measure of integrity is the price paid for his time in court. Such a witness invites contempt; he inspires abuse, he arouses the belligerency of counsel and incites to disconcerting and embarrassing scenes, utterly unworthy of the respect due to members of honorable professions.

I have such knowledge of the truth of these observations that, were it not invidious, I could cite in proof of them the names of many of the most distinguished surgeons and physicians in this country who refuse to appear in court because they are unwilling to be made ridiculous by some smart, bumptious attorney desperately bent on winning his case. And I submit to you that these gentlemen are in nowise lacking in a proper sense of humor.

It should not be taken from these remarks that the writer is oblivious to the many cases of record where the medical expert has been wholly competent, honest and disingenuous, and where counsel and court have treated him with proper dignity and respect. Such ideal conditions prevail where the factors are ideal. That they are refreshing exceptions, however, to a limp and decadent practice, is only too well known to every man of experience.

What can be done, then, to insure a proper selection of the medical expert and the best and most informing testimony from him?

In Germany the appointment is made by the court and the expert is required to appear whenever called by the judge. There is a penalty attached for disregarding the summons and the commonwealth provides a moderate fixed compensation together with expenses for appearance and testimony in court. So that the medical expert in Germany may be regarded as an officer of the court. And the same relation exists in most of all the other Continental countries. It is regarded an honor and distinction to be thus designated and there is every courtesy and dignity attendant on the office which its responsibilities should entitle it to. But the utmost care is observed in the choice of physicians and surgeons as official experts, that only men of known special scholarship and highest training and personal integrity are selected.

In England and her colonial possessions and in the United States to a large extent, the expert is selected by counsel and the court is not consulted.

Last year a bill drafted by the New York State Bar Association and the New York State Medical Society and New York Academy of Medicine, was introduced into the legislature of the State of New York, which provided that the Justices of the Supreme Court assigned to the Appellate Division should designate at least ten, and not more than sixty, qualified physicians and surgeons in each Judicial District who could be called as medical expert witnesses by the court or by any party to a civil or criminal action, and who, when so called should testify and be subject to examination and cross-examination as other witnesses are; that any designa-

tion might at any time be revoked without notice or cause shown, and any vacancy might at any time be filled; that when so directed by the trial court, witnesses so called should receive for their services and attendance such sums as the presiding judge should allow, to be at once paid by the fiscal officer of the county in which the trial is had, and that the act should not be construed as limiting the right of parties to call other expert witnesses as heretofore. The bill passed in the Assembly but failed in the Senate. It will be presented to the next legislature and it is regarded by the bench and bar of many of the states as a long step toward the solution of a vexed and important problem." (Hon. A. T. Clearwater, June '09 *North American Review*.)

In many of our cities an understanding exists between the bench and the medical profession that certain men known to be distinguished in a special department of practice shall be regarded as eligible experts and from a list of these a choice can be properly made. This has not been made mandatory by statutory enactment, but it has been found to be a feasible solution of many difficulties and has greatly facilitated the trial of insanity and other cases where special technical knowledge is demanded of the witness.

Were it not for the Sixth Amendment to the Constitution of the United States and the State's Bill of Rights, granting the accused in criminal actions the privilege of facing the witnesses against him, the taking of medical expert testimony in criminal cases could be greatly expedited by direct report of the findings in a case to the court and jury, or to the court alone, were that admissible. It would do away with the tedium of prolonged controversy over unessential technicalities. It might deprive garrulous attorneys and presuming medical men of much public notice which they could not otherwise obtain; but it would contribute immeasurably to the dignity of our courts.

It may be accepted from the opinions which have been repeatedly given by jurists that the "hypothetical question" is the proper vehicle of supposed fact by which the expert's opinion may be conveyed to the jury. But however much it may remain in favor with the court and bar, the layman and the medical expert himself still look upon its practical working out as little short of a farce. If the bar feels itself competent to so abridge the text of these questions as to make them less ludicrously absurd and make the anticipated answer more logical, a long step will have been taken in wholesome reform.

Neither the practice of law nor the practice of medicine need ever depart far from the realms of common sense. It is quite unnecessary that either profession should adhere to rules of practice which persistently call down contemptuous ridicule. Can any of us deny that such has been the universal verdict of the people in certain notable criminal trials in this country in the last decade?

It would seem that reform of these unhappy conditions would be most cordially fostered by the bar, but I was recently somewhat puzzled, in a notable contribution on this subject from the pen of one of America's most distinguished jurists, to read these words: "It is universally admitted that so grave a

defect in the administration of justice should be remedied, and it is conceded that the defect is of such long standing that reform will be slow and difficult, largely because of the inertia of the bar. I regret to say that I have found a greater degree of enthusiasm for better methods among physicians than among lawyers." (Judge A. T. Clearwater, loc. cit.)

I have faith that what Judge Clearwater designates "the inertia of the bar" may be merely an expression of the very proper dignity and conservatism which has ever hedged about proceeding of the law, and that when the bar becomes fully awakened to the proportions and universality of these abuses it will rise in its power and overthrow the men and measures which perpetuate them. Certain it is that if we are to improve the status quo of the medical expert, we shall scarcely succeed by poking fun at the illiteracy or inconsistencies of one whose very density makes him impervious to scorn. It would seem the better way would be to establish standards of fitness which should govern the selection of the medical expert, and that this selection should be delegated to the judges of the court.

The evidences of liberal learning, high ethical character, scholarship and extended training in a special branch of medicine or surgery, and the reputation as a studious and conscientious practitioner, should be the distinguishing elements in the medical expert. Such men may be found in every populous community in North America, and conspicuously so in cities of a population of one hundred thousand and over.

In any measure looking to genuine reform, both as to the selection of experts and the taking of testimony, the bar will find a very cordial co-operation from the representative men in the medical profession. To most of us the office of medical expert is now a most distasteful ordeal, to be shunned wherever possible. If you wish the best that we can give you, you must win our confidence, treat us graciously and as far as possible relieve us of unnecessary embarrassment. A very great and sane jurist has recently said: "Scientific opinion to be of controlling value can be given only under conditions of mental repose. The haggling, sharp interruptions, uncalled-for wit, insolent comment and other too common features of important civil and criminal trials, are not such conditions. While they put some witnesses on their mettle, they throw the majority and the more competent into a state of mind in which all sorts of stupidities may be expected."

We have a right to require the highest learning and qualifications from not only the medical expert, but it has seemed to me that something exceptional in cleverness and versatility may reasonably be expected of the barrister who interrogates him. One need not attend many trials where experts appear to discover what a hurricane of chaff is sometimes—ofttimes—raised, in the winnowing of a few grains of truth. It is an ancient subterfuge and is not limited to legal procedure. But it deceives no one so much as this species of counsel himself, and is an intense weariness to a patient witness, court and jury.

It is therefore clear that here again is afforded

an opportunity for a distinct reform, to the end that in an examination and cross-examination of an expert witness the strictest brevity consistent with securing a clear statement of scientific truth should be observed. And this must not be construed as leaning favorably to categorical answers when a word or two of explanation or illustration would be invaluable. The court should always secure to the expert witness the privilege of making clear a technical point to the jury, by any regular and accepted method employed in modern scientific demonstration. It is not only a prerogative of the witness, it is a distinct duty he owes to the court and to the jury.

Nothing can be more bewildering in the decorum of a court proceeding than the petty haggling or the presumptuous bravado with which a lawyer, conscious of temporary advantage over his adversary, seeks to make a victim of the expert witness sitting helpless before him. I have been present, sometimes as spectator and sometimes as witness, on a number of these edifying occasions and I have marveled at the *sangfroid* of the honorable court as the advocate, fierce, red-faced, in mock choleric heroics, paced threateningly up and down before the witness, terrifying as an "army mighty with banners."

It is indeed a most impressive spectacle, and one cannot doubt, may contribute somewhat to relieve the tedium and stagnant atmosphere of a drowsy court-room. One hesitates therefore to be rudely disillusioned of such a vision, but it would appear to be a quite unnecessary and superfluous vocal disturbance, and contributes so feebly to the scientific competency of the expert, and to the gracious ends of justice, as to lead one to the inquiry, "Could it really by any peradventure be dispensed with?"

Again we have been greatly instructed by the spectacle of skin and cancer specialists, obstetricians, rhinologists and general practitioners, with a lifetime experience comprehending possibly six cases, taking the stand as expert alienists to pass on the sanity of a homicide. These gentlemen can, and usually do, qualify as experts. They are to be found graciously blessing every community with their marvelous versatility; for they pose as "specialists" in any department of medical science which conveniently calls them to service. Aside from their readiness to illuminate the mind of counsel groping in the dark, they make equally admirable expert witnesses whether called by the defense or the prosecution. Sometimes on occasion it is said, through some *lapsus memoriae*, representatives of this cult have been known to testify with equal credibility on each side, usually, however, with a respectable interval of time intervening between appearances. Or having been called by the state, and, on account of its depleted exchequer not becoming available, they have proved a most serviceable and valuable succor to a struggling defense. Thus have we seen these valiant exponents of a great art and science distinguish themselves—and us.

A prominent member of the bar once said to me: "You of course know Dr. So and So." "Very well," said I. "Do you know," said he, "he makes a capital witness?" "Yes," I answered, "he is a very brave man." "That is it," said he, "you cannot rattle him. He answers 'Yes' and 'No' and sits as

stolid as a bronze statue in the presence of a tempest of grilling and abuse."

This genus of the species Medical Expert is sometimes as celebrated for his "smartness" and repartee as his brother is for stolidity. For every Roland from the castigating tongue of counsel he returns a stinging Oliver. Such coruscating rhetoric sometimes enlivens a sultry court-room; but how much more does it create a sense of pity and disgust in the minds of sincere men, whose standards of ethics and of learning lift them above such coarse usage. It seems quite manifest that the time has come for members of the bar and medical profession to undertake a concerted movement toward reform. Efforts have been made in various states, as Maine, Massachusetts, Pennsylvania, Indiana and New York, to secure legislation which shall define the qualifications and appointment of the expert, but as yet the best hopes have failed of fruition.

While the act which passed the New York Assembly has very many admirable features in it, it lacks the broad spirit and dignity of the German system. I have doubt if we could improve on the conditions which govern the medical expert in the German Empire, and hence, with certain slight modifications which would make it adaptable to American practice, I believe we cannot do better than endorse its adoption here. Its adoption in American courts would instantly divest the medical expert of the obloquy which is the disgust of every decent citizen, and clothe him with the dignity and credit which is the deserved station of every scientific man.

Recently on motion of the writer, the Los Angeles Medical Society voted to request the council of the association to appoint a committee, to confer with a committee of the Bar Association, looking to legislation on this subject which shall correct some, at least, of the evils which now render practically worthless much that passes in this state as medical expert testimony. This committee has been appointed and it is sincerely hoped that much good may come from its deliberations jointly with one from your honorable body.

Why should conditions longer prevail, in this commonwealth at least, if the intelligent representatives of the two great professions chiefly concerned, and who are unanimous in their condemnation of the present wretched status, will unite in one powerful endorsement of legislation which shall effectually remedy this evil?

I have faith that the time never was more auspicious, the sentiment never more deeply grounded, and the authority of a great body such as yours never so potent for the execution of this reform, as at the present hour.

Dr. Thos. J. Orbison, Sec'y Com.

Los Angeles County Medical Association,
Los Angeles, Cal.

My Dear Doctor: Much to my regret, I find it impossible to be with you on the night of March 18th. I just received your notice and am leaving this evening for two weeks' absence from the state,

on the advice of a member of your Association; so you see my absence is unavoidable.

I had very much hoped to be with you on this occasion and express to you some ideas which have come to me from my experience in the use of medical expert testimony, and to suggest, if I might, in my humble judgment, what I consider to be the proper and legitimate field for such testimony.

I think the feature which has embarrassed the physicians in this field is that of partisanship on one side or the other of a case. The physician's expert testimony is, and of necessity must be, largely judicial. It is the making up of a verdict by use of the facts which come under his observation. I have learned in my experience in life that no man is big enough and broad enough to be on one side of a case and at the same time to be a competent, fair and impartial judge of its merits.

The man whom we oftenest deceive and mislead is the man inside our own suit of clothes.

While it is true that doctors and lawyers and all others of mankind have differences and will differ in their conclusions, still that element of difference will be largely eliminated on the subject in question if the physician will approach the subject as a judge owing allegiance to neither side. It has been a matter of much concern, I know, to the medical profession to find in a criminal trial ten or fifteen eminent physicians arrayed on one side of a case and the same number equally eminent and able arrayed on the other, and apparently the physicians of the plaintiff swearing to a different medical opinion from those arrayed on the side of the defendant. As a matter of fact, however, that which in such an instance appears to be a difference of opinion among physicians is not such in reality. By skillful manipulation of questions—hypothetical questions usually—the elimination by one side of certain features which are included in the question given to the other side, testimony of the medical witnesses is made to appear at variance with that of the physicians on the other side, when, as a matter of fact, they do not differ at all materially.

However, to the popular mind such an exhibition cannot tend but to embarrass your profession. I think in the main if you will eliminate partisanship you will have solved the question. It will then be a matter of skill and learning absolutely.

I might call your attention to the fact that the usual issue about which physicians differ in court is on a question of insanity, which, as you know, is one extending over so great a stretch of mental territory that differences of opinion are very easy. "All the world except me and thee and thou art just a little" is not so wild a statement in fact as one might suspect.